

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN DANIEL NEFF,

Defendant-Appellant.

UNPUBLISHED

August 27, 1999

No. 209598

Isabella Circuit Court

LC No. 97-008208 FH

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

A jury convicted defendant of felonious assault, MCL 750.82; MSA 28.277. The trial court sentenced defendant as a third felony habitual offender, MCL 769.11; MSA 28.1083, to three to eight years' imprisonment. We affirm.

I. Basic Facts And Procedural History

During a bar fight, defendant hit another patron on the side of the head with a beer glass. On appeal, defendant claims that: (1) the trial court failed to instruct the jury regarding the defenses of accident and self-defense; (2) his trial attorney failed to request these instructions, resulting in ineffective assistance of counsel; and (3) his sentence was disproportionate.

II. Preservation Of Issues And Standard Of Review

A. Sua Sponte Jury Instructions

Defendant failed to make any objection to the instructions read to the jury by the trial court. Therefore, defendant has failed to preserve this issue for appeal. *People v Curry*, 175 Mich App 33, 39; 437 Mich 310 (1989). In the absence of an objection to or request for an instruction, this Court reviews claims of instructional error for manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

B. Ineffective Assistance Of Counsel

Defendant failed to create a testimonial record in the trial court with regard to a claim of ineffective assistance of counsel. This failure forecloses appellate review unless the record contains sufficient detail to support the defendant's claims. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Darden*, 230 Mich App 597, 604; 585 NW2d 27 (1998). This Court reviews claims of ineffective assistance of counsel de novo. See, e.g., *People v Northrop*, 213 Mich App 494, 497-498; 541 NW2d 275 (1995).

C. Sentencing

Defendant was not obligated to take any affirmative steps to preserve this issue for appellate review. See MCR 6.425. This Court reviews a trial court's imposition of a sentence for an abuse of discretion, which will be found where the sentence imposed does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990); *People v Castillo*, 230 Mich App 442, 447; 584 NW2d 606 (1998).

III. Sua Sponte Jury Instructions

Defendant argues that the trial court erred when it failed to sua sponte instruct the jury on defendant's defenses of accident and self-defense. We disagree. The Michigan Supreme Court has determined that a trial court is not required to present an instruction of a defendant's defense theory "unless the defendant makes such a request." *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995), modified on other grounds 450 Mich 1212 (1995). Here, defendant made no such request. Thus, defendant's claim that "manifest reversible error occurred" is without merit.

IV. Ineffective Assistance Of Counsel

Defendant argues that his counsel's failure to request that the trial court instruct the jury regarding his defenses of accident and self-defense amounted to ineffective assistance of counsel. We disagree.

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine: "(1) whether counsel's performance was objectively unreasonable, and (2) whether the defendant was prejudiced by counsel's defective performance." *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997). This test "requires the greatest level of factual inquiry into the actual conduct of the defense and its effect on the outcome of the trial." *Id.* at 156. To satisfy the first prong of the test, the defendant must establish that counsel made errors so serious that counsel was not functioning as the counsel guaranteed to the defendant by the Sixth Amendment. *Id.* at 164-165. To satisfy the second prong, the defendant must show that, but for counsel's ineffective assistance, there is a reasonable probability that the outcome would have been different. *People v Plummer*, 229 Mich App 293, 307; 581 NW2d 753 (1998). We will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). That a strategy does not work does not render its

use ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

In light of the record before us, we find that defense counsel's decision or failure to request an instruction on the theories of accident and self-defense did not prejudice defendant. This was not a complex case; defendant's position throughout the trial was that he did not intend to strike the victim with the glass. An instruction on defendant's theories, in light of the evidence presented at trial, would have added little to the jurors' understanding of the issues before them. Essentially, this trial involved a credibility test between defendant, the victim, and the other bar patrons who testified. An instruction on defendant's theories would not have given him a reasonably likely chance of acquittal. *Plummer, supra* at 307. Thus, defense counsel's failure to request an instruction on defendant's theory of the case was not a mistake that requires reversal.

V. Sentencing

Defendant argues that his sentence was disproportionate under *Milbourn, supra*. We are satisfied that the sentence imposed was proportionate to the offender and the offense. *Id.* Defendant has a history of assaultive behavior, and this was a serious offense. In addition, defendant was sentenced as an habitual offender. "[A] trial court does not abuse its discretion in giving a sentence within the statutory limits established by the Legislature when an habitual offender's underlying felony, in the context of his previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society." *People v Hansford*, 454 Mich 320, 326; 562 NW2d 460 (1997). Under these circumstances, his three- to eight-year sentence was not an abuse its discretion.

Affirmed.

/s/ Richard A. Bandstra

/s/ Kathleen Jansen

/s/ William C. Whitbeck